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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 151

ISAAC CHAPMAN,

Petitioner,

vs.

R. J. HOAGE ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

HARLAN WOOD,
Counsel for Petitioner.

JAMES P. DONOVAN,
Of Counsel.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Isaac Chapman, respectfully shows unto this Honorable Court:

I.

That your petitioner instituted a suit in equity in the Supreme Court of the District of Columbia for a mandatory injunction against R. J. Hoage, Deputy Commissioner of the United States Employees' Compensation Commission, for the purpose of requiring said Deputy Commissioner to make an award of compensation due him under the provisions of the Act of Congress of March 4, 1927 (44 Stats. 1424), as amended by the Act of Congress, May 17, 1928 (45 Stats. 600), and known as the Longshoremen's and Harbor Workers' Compensation Act.

In the original suit in the Supreme Court of the District of Columbia the *real* defendant, namely, the Indemnity Insurance Company of North America, was permitted to intervene.

On December 15, 1928, the petitioner received serious and permanent injuries in the course of his employment. Under the provisions of the Longshoremen's and Harbor Workers' Compensation Act the petitioner duly and timely filed a notice of his election to sue a third party, namely, the Washington Railway and Electric Company, upon the Commissioner's prescribed form. Suit was filed against the Washington Railway and Electric Company in the Supreme Court of the District of Columbia and a judgment of Three Thousand ($3,000.00) Dollars was obtained against the third party. The third party appealed to the Court of Appeals of the District of Columbia, and the judgment of the Supreme Court was reversed (*Washington Railway and Electric Company* v. *Chapman,* 62 App. D. C. 140, 141, 142, 62 F. (2d) 486). In reversing the judgment of the Supreme Court of the District of Columbia, the Court of Appeals of the District of Columbia in the action against the third party at page 141, among other things, said:

> "That they were guilty of contributory negligence in driving upon the track, under these conditions, is in our opinion beyond question."

And again at page 142, notwithstanding the legal anomaly, the Court of Appeals, among other things, said:

> "There is nothing here to establish any negligence on the part of the defendant in the operation of its car or the failure to do anything after discovering the peril of the driver of the truck by which the accident might have been avoided."

Mr. Justice Van Orsdel wrote the opinion of the Court of Appeals in the case of *Washington Railway and Electric*

Company v. *Chapman* (your petitioner). He also wrote the majority opinion of the court in the instant case, the court being divided, three Justices in favor of the majority opinion and two the minority opinion.

On October 9, 1933 (four years, nine months, and twenty-nine days after the cause of action of Chapman accrued), this Court, in Petition No. 316, denied certiorari to the Court of Appeals of the District of Columbia in the case of your petitioner vs. Washington Railway and Electric Company, and thereby affirmed the judgment of the Court of Appeals, reversing the judgment of the Supreme Court of the District of Columbia.

On May 9, 1934, the petitioner discontinued by præcipe duly filed its law cause against a third party, and thereafter on June 27, 1934, had a hearing and presented his evidence for compensation before the Deputy Commissioner. The Deputy Commissioner on the 27th day of June, 1934, entered an order denying compensation and assigned as his reason therefor the following:

> "That the claimant, having filed his election to pursue his remedy against a third party and having failed to pursue his remedy to completion, has prejudiced the rights of the employer herein by allowing the statutory limit to run against any rights the employer might have had, and the claimant therefore is not entitled to compensation within the meaning of the Act." (R. 74, 75.)

There was no evidence before the Commissioner either of what at the time constituted the Statute of Limitations or whether in any action brought by the employer in the name of the employee against a third party that the Statute of Limitations might be pleaded as a defense. Neither did the Commissioner take any notice of the judgment of the Court of Appeals affirmed by this Court, reversing the judgment of the Supreme Court of the District of Colum-

bia, which held in effect that Chapman, the petitioner herein, had no right of recovery against the defendant.

Whereupon, the present suit was instituted for a mandatory injunction. The defendants moved to dismiss the petitioner's Bill of Complaint and set up among other things as grounds that the Compensation order of the Deputy Commissioner was in accordance with law. (R. 67-68.)

It is from the judgment of the Court of Appeals affirming the final decree of the Supreme Court of the District of Columbia that this petition is directed.

The insurance carrier at the hearing before the Deputy Commissioner admitted plaintiff's injury, the relationship of employer and employee, the applicability of the Act of Congress, the time of injury, the sustaining of injuries during the course of employment, notice of the injury, and the rate of wages allowed. It denied the plaintiff's permanent disability or for the length of time alleged. (R. 6.)

II.

The grounds upon which this petition is based are as follows:

1. The judgment of the United States Court of Appeals for the District of Columbia as expressed in the majority opinion is not a true and proper legal construction of the Longshoremen's and Harbor Workers' Compensation Act by reason of the fact that the Court has legislated into the Act by judicial construction language not contained in it, which transforms it in its effect and policy contrary to the original purpose and intent of the Act, thereby striking down its remedial character which it should afford by the Courts' strict technical interpretation according to substantive law.

2. The United States Court of Appeals for the District of Columbia erred as a matter of law in holding that a

suit by an injured employee against a third party under the aforesaid Act of Congress had to be determined by a final judgment in a Trial Court prior to his recovery of any compensation in a case where there is no assignable fault for the injuries sustained by the employee, there being no such language in the Act.

3. The United States Court of Appeals for the District of Columbia by the majority opinion and judgment entered in this cause departs from the clear intent and purpose of the aforesaid Act of Congress as judicially construed by it and the other Federal Courts of the United States; this Act being a Federal Statute and applicable in all Federal jurisdictions and being of such importance to the many thousands of employees so engaged in the activities annunciated by it is of tremendous and widespread general importance so as to justify in the humble opinion of counsel a judgment of this Court and the charting of a course of action for the Federal Judiciary which should construe it in its proper administration and the fair administration of justice generally.

4. The majority opinion of the United States Court of Appeals for the District of Columbia is contrary to the spirit of its previous decisions in construing the aforesaid Act of Congress and causes a divergence or contrariety of opinion in the Appellate Courts of the United States and particularly as expressed by the unanimous opinion of the United States Circuit Court of Appeals for the Second Circuit in the case of *American Lumbermen's Mutual Casualty Company* v. *Samuel S. Lowe et al.*, 70 F. (2d) 616.

5. The majority opinion and judgment of the United States Court of Appeals for the District of Columbia places a legal misconstruction on the law of *subrogation*.

6. The majority opinion and judgment of the United States Court of Appeals for the District of Columbia in

the absence of any evidence whatsoever wrongfully holds that it is not the duty of an insurance carrier to establish affirmatively any prejudice or damage resulting to it by evidence which must necessarily be the case in order to sustain any cause of action by way of subrogation.

7. The majority opinion and judgment of the United States Court of Appeals for the District of Columbia without any warrant of law held that the discontinuance of the petitioner's cause of action in the light of its own judgment (62 App. D. C. 140, 142) did not constitute for all legal and practical purposes a final determination of his cause of action.

8. The majority opinion and judgment of the United States Court of Appeals for the District of Columbia without any warrant of law attempts to foresee and prophesy the problematical filing of the plea of the Statute of Limitations as a defense in the event the Washington Railway and Electric Company might have been sued in the name of the petitioner to the use of his employer under the provisions of the aforesaid Act of Congress, although in this case there was no evidence that the Statute of Limitations had begun to run.

9. The United States Court of Appeals for the District of Columbia wholly and totally fails to give the plaintiff the benefit of the presumption accorded him under Section 20 of the aforesaid Act of Congress.

III.

ARGUMENT AND AUTHORITIES.

Longshoremen's Act Misconstrued.

Grounds One (1), Two (2), Three (3).

For the convenience of this Court and the purposes hereof, the assigned errors will be grouped.

This is the second time this paupered petitioner on the same facts though against different parties has knocked at the door of this Court for relief. His first petition (No. 316) was denied (October 9, 1933). In the name of justice, it is to be hoped that this petition will be granted by this Honorable Court.

In the economy of time the facts in the case will be adopted from the two opinions of the court below with the exception that the injury occurred on December 15, 1928, application for hearing before the Deputy Commissioner was April 26, 1934; the cause was not abandoned on March 1, 1934, nor as a fact is it abandoned yet until this Court passes upon the question involved; a hearing was had on June 8, 1934, before the Deputy Commissioner; the legal conclusions of the majority opinion unsupported by authority and contrary to the beneficent purposes, remedial spirit, and humane intent of the Act in question cannot be shared by the petitioner.

While counsel would not presume to be critical of the proprieties of the Justice who wrote the majority opinion of the court below because he had previously passed upon the facts for the court in the same case against the third party (*Washington Railway and Electric Company* v. *Chapman*, 62 App. D. C. 140), it is worthy of passing observation particularly in view of the legal amphibia wherein he said on page 141 of that opinion that Chapman (the appellee) was guilty of *contributory negligence* and on page 142 he said there was not negligence on the part of the appellant.

The Act in question is remedial. It calls for a liberal construction. It is intended to give relief where one is injured through *no assignable fault*. Doubts should be resolved in favor of the injured employee. *Liberty Mutual* v. *Hoage*, 62 App. D. C. 189, 190; *Standard Accident Insurance Company* v. *Hoage*, 62 App. D. C. 245, 247 (citing *Allan-Garcia Co.*, v. *Industrial Commission*, 334 Ill. 390;

166 N. E. 78; *Texas et al.* v. *Tyler,* 283 S. W. 929, 932, 933); *Fidelity and Casualty Co.* v. *Burrus,* 51 App. D. C. 228, 230. Such are the decisions of the United States Court of Appeals for the District of Columbia. The Act may be searched from cover to cover and nowhere in it does it require a case to be reduced to final judgment by the Trial Court where an election is made. This is ably and truly stated by the learned Justice who wrote the minority opinion of the court when he said *"wholly outside any express provision of the Act."* (R. 80.) To require it judicially is to allow the court below to legislate language in the Act and on the other hand to destroy the very purpose Congress had in mind in its passage. The sound and just reasoning of the minority opinion of the court below must make its appeal in the breast and heart of the Chancellor. Otherwise, as it says, the 'whole purpose of the Act is disregarded.'

The Law of Subrogation Misconstrued.

Grounds Four (4), Five (5), Six (6).

It will not trouble this Court in concluding that the intervenor is the real party in interest; the Deputy Commissioner is merely an administrative government employee possessing quasi-judicial powers. The substantive law of subrogation and it is no different under the Longshoremen's Act, but by its terms restricted for its application and conditioned upon the *recovery of damages* by the injured employee against a third party (see Act Section 33 (a), (b), and (f); R. 76) involves three elements, (a) a valuable right, (b) a person who owns the right, and (c) a person who is seeking to be substituted in that ownership. *Belnap Hardware and Manufacturing Co., et al.* v. *Ohio River Contract Co. et al.,* 271 Fed. 144, 146.

What have we in this case? No valuable right. Why? Because the Court of Appeals for the District of Columbia has passed upon the merits of this case (62 App. D. C. 140, 141) and held as a matter of law that the petitioner was guilty of contributory negligence (R. 80). Consequently, the intervenor has no right. In the name of Heaven, how can it be said that the intervenor, who might if the petitioner had recovered damages have become the subrogee, has been prejudiced or damaged?

The court below in the suit by petitioner against the third party held that the third party was guilty of no negligence; consequently, petitioner did not own any right. Then element number one is absent. The only element present is the third one (intervenor) who by a strained fiction and the judicial legislation of the court below seeks to be substituted in the ownership of something non-existent.

The majority opinion and judgment of the court below is contrary to the unanimous opinion and judgment of the Court of Appeals for the Second Circuit in the case of *American Lumbermen's Mutual Casualty Co.* v. *Lowe, Deputy Commissioner et al.*, 70 F. (2d) 616. Mr. Justice Hand there said:

> "In our opinion some prejudice to the employer or to the carrier from the discontinuance of the action ought to be shown in order to render the initial election unalterable."

Counsel for the petitioner can conceive of a situation where the right of subrogation might be prejudiced, as in a case where action was filed and no process served, or where a suit was filed and the plaintiff did not present himself for trial, or where an election was filed and no action was taken; in such cases, if a substantial right of subrogation existed, it would be defeated by the running of the

Statute of Limitations if pleaded. It is submitted that no such situation is before this Court.

There are numerous excerpts stating general principles of law arising under the Employees' Compensation laws of the State of New York in New York citations. Salutary as those general principles may be, it is submitted that they have no practical application to the law and facts in this case. It is submitted that the right of subrogation referred to in our Statute implies not an empty right to enter suit, but a substantial right to recover something of value in order to help make whole any loss the insurance carrier may suffer as the underwriter of the employer. The New York authorities are appropriately criticized in the language of Mr. Justice Adkins as he criticized them in the case of Van Duesen v. Hoage, Equity No. 58,030, of the Supreme Court of the District of Columbia, to the effect that from those New York cases it is not shown that a substantial right had been prejudiced. In the opinion of Mr. Justice Adkins in the Van Duesen case, he says:

> "Counsel for each of the defendants in their briefs cite several New York cases in support of the position taken by the Deputy Commissioner.
>
> "In some of those cases the right of action against the third person had been barred by the Statute of Limitations, and the Court based its decision on the ground that, by claimant's failure to go on with the action against the third person, the carrier had been deprived of a *substantial right* which it would have had but for the election, namely, 'its right of subrogation to claimant's remedy against the third party.'
>
> "In those cases it did not appear affirmatively that *the right of subrogation was valueless. If the right of subrogation is without value it cannot be described as a substantial right.*
>
> *"Where it has been demonstrated that there is no hope of collecting any money by virtue of a suit against the third person, I think the requirement of section 33*

(*f*) *is excused* and that claimant's action in not suing does not deprive him of his remedy here.

"Therefore, the motion to dismiss is overruled." (Italics supplied.)

In the Van Duesen case, a notice of election was filed as prescribed by the Longshoremen's Act, but in another suit against the same third party by one injured in the same accident it was made to appear that the third party was judgment-proof. Then the election was abandoned, no suit was filed, and successful recourse was had against the insurance carrier. In the instant case, suit was filed, judgment obtained, judgment defended in the Court of Appeals of the District of Columbia and even prosecuted to the Supreme Court of the United States in Chapman's endeavor to sustain the judgment for the benefit of the intervenor. Chapman, it has been judicially determined, was guilty of contributory negligence, which barred his right of recovery and which denies for all time the assumed conclusion on the part of the Deputy Commissioner and the Court and the intervenor that a right existed which, it is further assumed, has been prejudiced. The decree below affirms these assumptions and conclusions.

How just and impeccable is that reasoning of Mr. Justice Adkins and how legally true is it confined to the terms of the Act?

The right of election is destroyed should the congestion of dockets of the Courts involved prevent a final judgment before the expiration of three (3) years. It may be observed in this connection that the finding of fact of the Deputy Commissioner, if sustained, would render ineffective the right of election of an injured employee if he should enter suit against a third party, provided in that litigation three years were consumed in its successive prosecutions from the Trial Court to the Supreme Court of the United

States. A party litigant cannot control the progress of the trial of cases in the Supreme Court of the District of Columbia or its Court of Appeals. Neither can he control the action or the time of it of the Supreme Court of the United States when it passes upon an appeal or upon an application for a writ of certiorari. Neither can he prescribe the time limits provided for by the various rules of Court for these Courts. Such powers are vested in the legislature and the several Courts involved. By the same token, certainly a Deputy Commissioner has no such power and it is submitted that he may not have such a power and thereby defeat the humane purposes of a remedial statute. It may be repeated here that certiorari was denied by the Supreme Court on October 9, 1933, more than four years and ten months after the date of the plaintiff's injury.

Nowhere does it affirmatively appear that the intervenor has been prejudiced in any right. There is no evidence that the Statute of Limitations runs from the expiration of three years—merely an observation on the part of intervenor's counsel. No pretense is made of any actual damage to it.

It is a demonstrable and indisputable fact that the intervenor has not only not been prejudiced but has been actually benefited by the *petitioner*. How? Petitioner was not required to seek damages in the first instance from a third party. Resort against intervenor was immediate. The result could have been that during all these years intervenor would have been paying petitioner. In addition thereto, the Act does not provide for the payment of any interest. Intervenor through the passing years has had the benefit of money now due petitioner. And in further addition, petitioner, deprived of what he might have had under the statutory and contractual obligation of the intervenor, has to his detriment and at his expense litigated even to

this Court to sustain his original judgment against the third party which in the end would have inured to the benefit of the intervenor. It would have received credit for the $3,000.00 verdict and been liable only for the deficiency. Aren't these simple annunciations benefits?

The Appellate Judgment Was Final.

Ground Seven (7).

The judgment of the Court below in *Washington Railway and Electricity Company* v. *Chapman,* 62 App. D. C. 140, 142, and affirmed by this Court in the denial of certiorari in No. 316 between the same parties on October 9, 1933, is to all intents and purposes a final judgment (R. 75, 80). If the case had been retried, of what avail would it have been to petitioner or intervenor? It would have, however, cost the Government money and further delayed petitioner's just claim for compensation. It would have been the solemn duty of the Trial Court to have directed a verdict against the petitioner upon a retrial. The minority opinion characterizes it as "bootless". The majority opinion characterizes it as "fruitless". It would have been a challenge to counsel's sanity. It is confidently known that this Court cannot be troubled with the constitutional necessity for the Court below in reversing the Trial Court that the law cases be returned for further proceedings. A judgment under the facts in this case and the judicial determination of it could not make a perfunctory judgment of the Trial Court of any sustaining legal value.

Limitations Must be Pleaded, etc.

Grounds Eight (8) and Nine (9).

Now we come to a proposition so fundamentally elementary that counsel dislikes to make reference to it. By

virtue of what power inherent or legislated could the Court prophesy the problematical filing of the plea of the Statute of Limitations as a defense should the intervenor have indulged in the violent assumption that it had any right of subrogation to sue the Washington Railway and Electric Company. Courts cannot prophesy. Courts deal with past events. Statutes of Limitations do not bar a right. They destroy, when specially pleaded, the means of recovery. Unless pleaded they are waived. They are statutes of repose. Such is the practically universal rule. 37 C. J. 1213. Notwithstanding this accepted rule of law and wholly in the absence of any evidence, the majority opinion and judgment of the Court metamorphizes it to the everlasting damage to petitioner unless this Court intervenes and starts the wheels of plain and unadulterated justice moving in the right direction. The majority opinion and judgment of the Court below literally slaughters those favorable presumptions under Section 20 of the Act with which the Court should really hasten to clothe the petitioner. The Court denies the petitioner every vestige of hope they grant. In so doing that broad and sympathetic purpose of the Act is defeated. It is remarkably strange that the New York decisions so generously cited in support of limitations that nowhere is the judicial suggestion made that to have the benefit of a Statute of Limitations it must be pleaded. Otherwise it affords no legal bar to recovery and under no circumstances does it destroy any right.

Conclusion.

Conscious of the limitations this Court has established in the issuances of writs of certiorari; conscious of the devastating effect to petitioner of the judgment of the Court of Appeals in its cold opinion patent with error and with a full and humble appreciation of the ultimate justice to which

petitioner is entitled and the power of this Court to rescue and preserve his rights, counsel witnessing this continuing injury to petitioner, fervently appeals to the magnanimous discretion of this Court to require the Court below to certify its proceedings here for review and that in the ends of common and every-day justice the judgment below be reversed and the Supreme Court of the District of Columbia be directed to issue the mandatory injunction as prayed in the original petition filed therein. Without such a review and direction all hope is abandoned.

Respectfully submitted,

HARLAN WOOD,
Counsel for Petitioner.

JAMES P. DONOVAN,
Of Counsel.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court in the case entitled "Isaac Chapman, Appellant, v. Robert J. Hoage, et al., Appellees," to the end that said cause may be reviewed and determined by this Court in the manner provided by law; and your petitioner prays that the judgment of the United States Court of Appeals for the District of Columbia be reversed.

ISAAC CHAPMAN,
By HARLAN WOOD,
Counsel for Petitioner.